

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

In the Matter of	§	
ASAP Paging, Inc.	§	
	§	No. DA-92-04
	§	WC Docket No. 04-6
Petition for Preemption of	§	
Public Utility Commission of Texas	§	
Concerning Retail Rating of Local Calls	§	
to CMRS Carriers	§	

**PUBLIC UTILITY COMMISSION OF TEXAS' COMMENTS TO
ASAP PAGING, INC.'S PETITION FOR PREEMPTION**

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SUMMARY

ASAP's petition presents no basis for federal preemption under either 47 U.S.C. § 253 or § 332(c)(3)(2001). The PUCT's decision on ASAP's complaint against CenturyTel of San Marcos, Inc. ("CenturyTel") addressed a straightforward question of state law regarding the retail rating of certain calls CenturyTel customers made to ASAP numbers under Texas's Expanded Local Calling Service ("ELCS"). *See* Texas Public Utility Regulatory Act ("PURA") §§ 55.041 *et. seq.*¹ That order raised no real competitive concerns — *i.e.*, barriers to entry or discriminatory treatment — as to any ASAP telecommunications business that subject the order to federal preemption under 47 U.S.C. § 253. Nor did the PUCT's order raise any issue concerning rate regulation of its paging (commercial mobile radio service or "CMRS") business that subjects it to federal preemption under 47 U.S.C. § 332(c)(3). The PUCT's decision was consistent with the relevant federal standards regarding CMRS. Likewise, ASAP offers no basis for preempting any PURA provision or PUCT substantive rule concerning ELCS.

The facts reflected in the record before the PUCT on ASAP's complaint are very different than the picture ASAP paints in its petition. Rather than primarily involving ASAP's paging service, the calls to the NPA-NXXs at issue were almost entirely for unrelated internet service provider ("ISP") dial-up access service. Although ASAP

¹ Appendix Tab A, Tex. Pub. Util. Comm'n, *Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action of ASAP Paging, Inc. Against CenturyTel of San Marcos, Inc.*, Docket No. 25673 (Order) (October 9, 2003) ("PUCT Order").

represented to the numbering authority that the numbers would be used for its CMRS paging service, ASAP issued several of the numbers — accounting for the vast majority of the calls to the three NPA-NXXs — to ISPs.² The service, if any, that ASAP provided to these ISPs was completely unrelated to its CMRS (paging) service. In effect, paging numbers ASAP obtained for customers in the San Marcos expanded local calling area were used primarily to avoid toll charges from San Marcos to ISPs in Austin.

Indeed, rather than impeding ASAP's ability to compete by depriving it of a federally-guaranteed right, the PUCT's order was in fact pro-competitive when viewed in light of these facts. By declining to allow ASAP an unfair advantage with San Marcos-to-Austin calling — calls that for all other providers' customers are intraLATA toll — the PUCT restored a level playing field for companies providing dial-up access to ISPs. Its decision did not discriminate against ASAP or prevent ASAP from providing telecommunications service on the same terms as all other providers.

² Appendix Tab A, PUCT Order at 14 (findings of fact 41).

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**PUBLIC UTILITY COMMISSION OF TEXAS' COMMENTS TO
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I. Factual Background

A. ASAP's paging and ISP customers.

As a paging company, ASAP takes calls other telecommunications providers transport to the ASAP switch and paging terminal and sends them (by the internet, satellite, and its own transmitters) to its customers' pagers.³ This service is "one-way," and calls are of a very short duration.⁴ However, of the NPA-NXX numbers at issue in ASAP's complaint against CenturyTel of San Marcos, only a few (all from the Lockhart NPA-NXX) were ever assigned to paging customers in these, or any other, areas.⁵ Several numbers were assigned

³ Appendix Tab A, PUCT Order at 10-11 (findings of fact 16-20).

⁴ Appendix Tab A, PUCT Order at 11 (findings of fact 20).

⁵ See Appendix Tab A, PUCT Order at 14 (findings of fact 40)(no paging customers assigned to Kyle or Fentress NPA-NXXs).

to ISPs, with at least four of the ISPs located in Austin; these numbers accounted for the vast majority of the calls to ASAP's Kyle, Fentress, and Lockhart NPA-NXXs.⁶ ASAP's "service" to these ISPs in no way involved its paging system or paging customers; all ASAP provided was a number (from an NPA-NXX obtained for the purpose of providing paging services) that was used instead to send these calls over other companies' networks to ASAP's Austin switch, which was collocated with or connected to its ISP customers.⁷ Calls to ISPs, continuing for as long as callers remain connected to the internet, are much longer than a paging call. The net effect was to provide toll-free access to ISPs for what otherwise would be a toll call from San Marcos to Austin.⁸

B. Expanded Local Calling Service Under the Texas Public Utility Regulatory Act.

The PUCT's decision was based upon the retail rating of calls under Texas' ELCS statute. The ELCS law, enacted in 1993, was designed to allow customers that share a "community of interest" with a geographically-adjacent area to petition the PUCT to obtain local calling between the two areas. *See* PURA § 55.041 *et seq.* If the PUCT grants the customers' request, the ELCS statute provides compensation to the petitioning customers' local exchange carrier for the loss of toll revenue and additional expense incurred to provide the expanded local calling. *See* PURA § 55.041-55.048 & 16 TEX. ADMIN. CODE § 26.219.

⁶ Appendix Tab A, PUCT Order at 14 (findings of fact 41).

⁷ Appendix Tab A, PUCT Order at 12 (findings of fact 26).

⁸ Appendix Tab A, PUCT Order at 15 (findings of fact 44).

Once ELCS is established, calls between local exchange carrier customers in the petitioning area and in adjacent areas are considered local and no toll charges are assessed. In 1995, upon petitions under the Texas ELCS statute from customers in areas adjacent to San Marcos, the PUCT established ELCS between CenturyTel's San Marcos customers and local exchange carrier customers in Kyle, Fentress, and Lockhart, Texas respectively.⁹

C. ASAP's Kyle, Fentress, and Lockhart NPA-NXXs and the calls from San Marcos to them.

The North American Numbering Plan Administrator ("NANPA") issues NPA-NXXs to telecommunications providers such as ASAP. At the time the NPA-NXXs are issued, the requesting provider designates the geographic location of the end-user customers for which the numbers will be used.¹⁰ In 2002, ASAP obtained three NPA-NXXs from NANPA and designated them for customers in Kyle, Fentress, and Lockhart, Texas — three towns south of Austin (and outside the Austin local calling area) and geographically-adjacent to the San Marcos area (and within the San Marcos ELCS calling area).¹¹ ASAP requested the calls be

⁹ *Petition of the Lockhart Exchange for Expanded Local Calling Service to the San Marcos et al. Exchanges*, Project No. 13267 (March 9, 1995) (Order No. 8). Because it was enacted prior to the deregulation of local telephone service in the mid-1990's, the Texas ELCS statute expressly provides for establishment of ELCS upon petition of an incumbent local exchange carrier's customers. See PURA § 55.045. Competitive carriers may obtain ELCS service for their customers through an interconnection agreement with the ILECs. PUCT rules require that CLECs receive such service under the same terms as ILECs. See 16 TEX. ADMIN. CODE § 26.272(d)(4)(A)(iii).

¹⁰ Section 2.13 of NANPA's Central Office Code Assignment Guidelines provide that, for landline traffic, NPA-NXX codes "will be used to provide services to premises physically located in the same rate center that the Central Office Code/blocks are assigned." Use of the Kyle, Lockhart and Fentress NPA-NXXs for ISP service violates these standards.

¹¹ Appendix Tab A, PUCT Order at 13 (findings of fact 33).

routed to its Austin switch but rated as if they were ELCS calls to Kyle, Lockhart, and Fentress.¹²

The record developed in connection with ASAP's complaint demonstrated that none of the calls from CenturyTel San Marcos customers to the ASAP numbers actually went to the Kyle, Fentress or Lockhart exchanges. ASAP did not have a switch or paging terminal in any of these exchanges.¹³ Instead, ASAP directed these calls to ASAP's switch in Austin — an intraLATA toll call from San Marcos.¹⁴ To reach ASAP's Austin switch, these calls were transmitted over CenturyTel and Southwestern Bell Telephone ("SWBT") trunks to a SWBT switch in Austin and, then, on to ASAP's Austin switch.¹⁵ ASAP's ISP customers were collocated at ASAP's Austin switch or had facilities connecting them to it.¹⁶ At least four of the ISPs assigned these Kyle, Fentress, and Lockhart NPA-NXX numbers were in fact located in Austin; calls to these numbers terminated at the ISPs in Austin.¹⁷ Only a handful of the other numbers in one of the NPA-NXXs were actually assigned to ASAP paging customers; no numbers were assigned to paging customers in two of the three NPA-

¹² Appendix Tab A, PUCT Order at 13 (findings of fact 36).

¹³ Appendix Tab A, PUCT Order at 13, 16 (findings of fact 36, 51).

¹⁴ Appendix Tab A, PUCT Order at 14 (findings of fact 39).

¹⁵ Appendix Tab A, PUCT Order at 15 (findings of fact 48).

¹⁶ Appendix Tab A, PUCT Order at 12 (findings of fact 26).

¹⁷ CenturyTel thus characterizes these as "virtual NXXs." Unlike most NPA-NXXs, they did not identify an end-user customers with a landline within the geographic area with which ASAP associated the numbers.

NXXs at issue.¹⁸ These calls were also routed to ASAP's switch in Austin, outside the San Marcos ELCS calling area.

D. Detection of ASAP's use of NPA-NXXs, their retranslation as toll calls, and ASAP's complaint against CenturyTel.

In April 2002, after discovering that calls to the three ASAP NPA-NXXs were in fact going to Austin, CenturyTel changed the "translations" for the calls from the CenturyTel customers to the ASAP NPA-NXX numbers such that dialing a "1" was required and that toll charges were assessed for these calls.¹⁹ Thereafter, these calls were assessed the same toll charges as any CenturyTel call from San Marcos to Austin.

In response, ASAP filed a complaint with PUCT in April 2002, arguing that because these NPA-NXXs were within the San Marcos extended local calling service area, calls to them from CenturyTel's San Marcos customers were "local" and no toll charges should be assessed.²⁰ Following an expedited emergency hearing, an administrative law judge ("ALJ") granted ASAP temporary relief.²¹ However, after a full evidentiary hearing before an ALJ, and the PUCT's consideration of the ALJ's Proposal for Decision, the PUCT reversed the earlier order granting the temporary relief and denied ASAP's complaint.²²

¹⁸ Appendix Tab A, PUCT Order at 12 (findings of fact 40).

¹⁹ Appendix Tab A, PUCT Order at 14 (findings of fact 42).

²⁰ Appendix Tab A, PUCT Order at 9 (findings of fact 3).

²¹ Appendix Tab A, PUCT Order at 9 (findings of fact 7).

²² Appendix Tab A, PUCT Order at 19-20.

The record developed in connection with the ASAP complaint confirmed that almost all the calls were to ISP, not paging, customers.²³ At the time of the hearing, no paging customer had been assigned Kyle or Fentress numbers; the only assigned numbers for these NPA-NXXs had been provided to ISPs.²⁴ The PUCT found that the calls were not ELCS and were properly rated as toll calls because the calling and called parties were not both within the San Marcos ELCS area.²⁵ For purposes of determining whether the calls qualified as local under ELCS, the PUCT found that the called party was the ISP provider, or in the case of paging calls, ASAP itself — *i.e.*, its Austin switch and paging terminal.²⁶ The PUCT also found that in light of ASAP's service to the ISPs, ASAP was required to register as a telecommunications utility under PURA § 52.103.²⁷

II. ASAP presents no claim for preemption under 47 U.S.C. § 253 or § 332(c).

A. The Gregory v. Ashcroft federal preemption standard.

The question of preemption under 47 U.S.C. § 253 or § 332(c)(3) should be analyzed under the standard the United States Supreme Court set forth in *Gregory v. Ashcroft*, 501

²³ Appendix Tab A, PUCT Order at 14 (findings of fact 41).

²⁴ Appendix Tab A, PUCT Order at 14 (findings of fact 40).

²⁵ Appendix Tab A, PUCT Order at 17 (conclusion of law 19) & 18 (conclusions of law 21 & 31).

²⁶ Appendix Tab A, PUCT Order at 11 (findings of fact 20A), 18 (conclusion of law 30) (ISP calls), 13 (findings of fact 32), & 18 (conclusions of law 29) (paging calls).

²⁷ Appendix Tab A, PUCT Order at 3, 17 (conclusions of law 14 & 15), & 20 (ordering ¶ 4).

U.S. 452 (1991). *See City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). In *Gregory v. Ashcroft*, the Court held that, in light of the substantial sovereign power states retain, courts should not infer Congressional intent to override state authority but should only do so when Congress has made its intention “unmistakably clear.” *Gregory*, 501 U.S. at 460. Thus, the federal statute that purportedly preempts the state action must “compel” the intrusion into state sovereignty. *City of Abilene*, 164 F.3d at 52.

Section 253 sets out a wide regulatory authority for the states over telecommunications services. *Id.* at 53. Neither 47 U.S.C § 253 or § 332(c)(3) compels preemption under the facts regarding the ASAP calls before the PUCT.

B. “Barrier to entry” preemption under 47 U.S.C. § 253.

Section 253 authorizes the preemption of state actions that pose barriers to entry for telecommunications providers. Section 253 provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. ... Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [relating to universal service] requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253.

The PUCT action at issue here plainly does not fall within Section 253's “barrier to entry” preemption. Simply put, ASAP has not been prevented from providing telecommunications service. It has provided both paging and ISP access service to its

numbers in the three NPA-NXXs. The PUCT's order (as well as the relevant PURA provisions and PUCT rules) do not directly affect ASAP's rates or the quality of its service. The only arguable effect on ASAP's service is indirect — that CenturyTel's San Marcos customers calling ASAP's paging and ISP customers with the NPA-NXXs at issue must pay intraLATA toll charges. But, the PUCT's decision merely places ASAP on the same footing as any other provider in a similar situation. ASAP, and ASAP's customers, are not being denied a right any other telecommunications provider, or their customers, would enjoy under the same circumstances. Shorn of the advantage it enjoyed before the calls from San Marcos to its three NPA-NXXs were detected and properly rated as intraLATA toll calls, ASAP now competes on the same basis as any other paging company or other telecommunications provider. It is not treated differently.

Even if viewed as prohibiting the ability of ASAP to provide its service, the PUCT's decision would fall within the Section 253(b) exclusion: necessary to safeguard the rights of consumers by ensuring all calls from CenturyTel end-users in San Marcos calls were rated on a uniform, competitively-neutral basis. Again, the bottom-line result of the PUCT's decision was to treat calls from San Marcos to ASAP's Austin switch and paging terminal and its Austin ISP-customers like calls made to any other party in Austin. Thus, Section 253 preemption is unwarranted.²⁸

²⁸ ASAP's petition offers little specific explanation of how any PURA provisions relating to ELCS, or any PUCT rule, conflicts with federal law such that it must be preempted. It does note in passing that, although these statutory provisions and rules do not present a problem on their face, as applied to ASAP they violate its federal rights. The PUCT's order presents no basis for federal

C. Commercial Mobile Radio Service (CMRS) Preemption under 47 U.S.C. § 332(c)(3).

Title 47 of the United States Code, Section 332(c)(3), provides:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except as this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services

47 U.S.C. § 332(c)(3)(A).

The facts reflected in the record show that this situation does not mandate preemption under Section 332(c)(3). The vast majority of the calls at issue were to ISPs and were not CMRS.²⁹ These ISP-bound calls, although made to numbers ASAP obtained from NANPA for paging service, did not involve any part of ASAP's wireless paging system and were in no way related to its CMRS business.

As for paging calls, the PUCT's decision did not directly affect ASAP's CMRS rates or costs. At most, there is an arguable *indirect* effect: CenturyTel's San Marcos customers must pay an intraLATA toll charge to page an ASAP customer with one of the three NPA-NXX numbers. However, such an impact falls far short of a clear restriction on entry or rate regulation necessary to justifying federal preemption of state action under Section 332(c)(3) and *Gregory v. Ashcroft*. At most, the PUCT's action relates to an "other term or condition"

preemption under Section 253.

²⁹ Appendix Tab A, PUCT Order at 13, 16 (findings of fact 29 & 30 and conclusions of law 6).

of CMRS service and, as such, is expressly not within the scope of Section 332(c)(3) preemption.

Section 332(c)(3) expressly authorizes states to regulate these “other terms and conditions” of CMRS. The retail rating under Texas ELCS of calls to ASAP paging customers is such an “other term and condition.” Courts presented with generally comparable situations — *i.e.*, matters that not do directly control CMRS rates, narrowly construed — have rejected arguments that they constitute prohibited CMRS “rate” regulation. *See, e.g., Mountain Solutions, Inc. v. State Corp. Comm’n*, 966 F. Supp. 1043 (D. Kan. 1997), *aff’d*, 149 F.3d 1058 (10th Cir. 1998) (USF contributions not “rates” within meaning of Section 332); *Brown v. Washington/Baltimore Cellular, Inc.*, 109 F. Supp. 2d 421 (D. Md. 2000) (holding that late fees are not “rates” but “other terms and conditions” under Section 332). The matter at issue in this case — the rates CenturyTel customers pay to page ASAP customers and specifically, whether San Marcos-to-Austin calls are local under Texas ELCS — is not even as closely linked to CMRS rates as those presented in *Mountain Solutions* and *Brown*. Those cases involved charges (but, the courts found, not “rates”) CMRS customers paid. ASAP’s complaint relates to a matter even more tenuously linked to an actual CMRS rate — charges that others pay to call a CMRS number. No charge of any sort to CMRS customers themselves is involved.

ASAP argues that the net effect of PUCT’s retail rating decision is to increase its costs by, in effect, requiring it to install switches in every local calling area, something it contends

is unnecessary. But even if the PUCT decision did affect ASAP's costs to some degree, the District of Columbia Circuit Court of Appeals has rejected the argument that such a cost impact constitutes prohibited state regulation of CMRS subject to preemption under Section 332(c)(3). *Cellular Telecomm. Industry Ass'n v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999) (holding that Commission fairly interpreted Section 332(c)(3)(A) to allow state assessment on CMRS providers for universal service fund as an "other term or condition" of CMRS service). State action that increases the cost of doing business cannot be equated with prohibited state rate regulation of CMRS service for purposes of Section 332 preemption; to do so would forbid nearly all state regulation and would be at odds with the "other terms and conditions" language in Section 332. *Id.*

III. Federal law does not prohibit toll charges for calls from CenturyTel's San Marcos customers to ASAP's Kyle, Fentress, and Lockhart NPA-NXXs.

A premise of ASAP's preemption claims is that the PUCT's action, and/or the relevant PURA provisions or the PUCT's substantive rules, deprived it of federally-guaranteed rights as a paging company, thus placing it at a disadvantage vis-a-vis its competitors and preventing it from competing. Most of ASAP's arguments in this regard amount to repackaged claims that calls to the Kyle, Fentress, and Lockhart NPA-NXXs from CenturyTel's San Marcos customers cannot be assessed toll charges; all are based upon a supposed federal requirement that all calls to CMRS numbers must be retail rated solely on the basis of the NPA-NXXs rate center assignments of the requesting carrier.

ASAP provides no authority for this contention. Indeed, as discussed below, the relevant authority states exactly the opposite: the PUCT's use of ASAP's switch as the location of the called party for retail rating is consistent with federal law. NPA-NXXs are not the "definitive source" for retail rating CMRS calls as ASAP contends. The PUCT's order, and the relevant provisions of PURA and the Commission's substantive rules, are consistent with federal standards for treatment of calls to CMRS carriers.

The Commission has defined the obligations between LECs and CMRS paging carriers. In the *TSR Wireless*³⁰ and *Mountain*³¹ orders, the Commission specifically stated that federal law does not prohibit a LEC from assessing toll charges to its customers for calls that terminate to a paging customer at a geographic location outside the LEC's local calling area.³²

In *Mountain*, a CMRS paging company ordered trunks from an ILEC to carry calls from several local calling areas where the paging company had assigned numbers to its point of interconnection in another local calling area. These trunks thus allowed callers to reach

³⁰ *TSR Wireless, LLC v. USWest Communications, Inc.*, FCC 00-194, File Nos E-98-13, E-98-15, E-98-17, E-98-18 (rel. June 21, 2000) ("*TSR Wireless Order*").

³¹ *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, DA 02-250, File No. EB-00-MD-017 (rel. Feb. 4, 2002) ("*Mountain Order*").

³² Alternatively, the LEC may offer a reverse toll billing option for paging traffic. ASAP has such a reverse toll billing arrangement with CenturyTel and SWBT covering paging calls to another NPA-NXX (222) that are sent to its Austin switch. ASAP has refused to enter into a such an arrangement with CenturyTel for the Kyle, Fentress, and Lockhart numbers. Appendix Tab A, PUCT Order at 11-12 (finding of fact 21).

the paging customers in each of these calling areas without a toll charge even though the paging company's point of interconnection was outside the calling area. After ordering the trunks, the paging company protested the ILEC's charges for them, presenting a variation of the argument that ASAP presents here: that the ILEC could not charge it, or its subscribers, for the interconnection. The Commission rejected that argument, finding that the LEC could charge for the trunks, which were a substitute for a reverse tolling arrangement. In reaching this conclusion, the Commission also held that although an ILEC may not charge a CMRS carrier for intra-MTA traffic because it constituted local traffic under the Commission's rules, "nothing prevents a LEC from charging its own end users for intraLATA toll calls that originate on its network and terminate over facilities that are situated entirely within a single MTA." *Mountain Order* at ¶ 11 & n.33. Citing its *TSR Wireless Order*, the Commission noted that the CMRS carrier could avoid these charges to its customers' callers by entering into a reverse billing arrangement or devising another way to transport the calls so they will appear as local to the calling party.

In addition, the Commission's *Local Competition Order* has also endorsed the approach that the PUCT applied in retail rating the CenturyTel customers' calls based upon the point of interconnection between LEC and CMRS carriers as the termination point of the call.³³

³³ In the context of considering reciprocal compensation obligations involving CMRS traffic, the Commission's *Local Competition Order* stated:

CMRS customers may travel from location to location during the course of a single

IV. ASAP's claims that the PUCT's order violates federal requirements fail.

A. *The PUCT did not mischaracterize the nature of ELCS.*

ASAP's arguments that the PUCT's decision "mischaracterized" the nature of ELCS are also repackaged claims that calls to the Kyle, Fentress, and Lockhart NPA-NXXs from CenturyTel's San Marcos customers cannot be assessed toll charges. As discussed, the PUCT's classification of the calls as non-ELCS and thus subject to toll charges is consistent with federal law. ASAP's unsupported assertion that the PUCT's decision as to the calls' retail rating under ELCS is somehow inconsistent with an unexplained "federal" conception of ELCS rings hollow.

call, which could make it difficult to determine the applicable transport and termination rate or access charge.... We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. *As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.*

In the Matter of Implementation of the Local Competition Provisions of the Telecomm. Act of 1996, 11 F.C.C. R. 15499 (1996) (First Report and Order) ("Local Competition Order"), *aff'd in part and vacated in part sub nom., Competitive Telecomm. Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T Corp. v. Iowa Utils Bd.*, 119 S.Ct. 721 (1999)(emphasis added). Although some parts of the *Local Competition Order* relating to wireline traffic were reversed on appeal, the portions relating to CMRS service remain intact. The FCC codified the relevant portion of the CMRS rules in Section 51.701(b)(2) of the rules adopted in the *ISP Remand Order*. *In the Matter of Implementation of Local Competition Provision in the Telecomm. Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* (Order on Remand and Report and Order), 16 F.C.C.R. 9151 (2001), *remanded Worldcom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)("ISP Remand Order").

B. The PUCT did not wrongly impose wireline concepts on wireless service.

The argument, again, is premised on ASAP's supposed federal right to retail rating of its calls based solely on its geographic assignment of the three NPA-NXXs. ASAP provides no authority for this contention; the relevant wireless (CMRS) authority already discussed squarely rebuts ASAP's claim. Indeed, this argument is plainly contrary to the Commission's orders discussed in the preceding section.

ASAP's allegations as to the cost of carrying the calls to CenturyTel are irrelevant to the ELCS retail rating decision. Its further observation that a call from a Southwestern Bell Lockhart customer to an ASAP Lockhart NPA-NXX would be toll under the PUCT's order is correct — and completely appropriate, given that all Lockhart-to-Austin calls are intraLATA toll.

C. The PUCT did not confuse retail and wholesale rating.

Again, the above discussion demonstrates that the retail rating for ELCS calls applied by the PUCT does not conflict with the federal law. Use of the called party's location may be appropriate for retail rating as well as for wholesale compensation. ASAP's statements as to the effect of the PUCT's order on FX service are irrelevant: the record includes no evidence, or even a claim, that ASAP has entered into any FX-type arrangement for the three NPA-NXXs at issue. The fact that in other circumstances carriers may work out special arrangements for transporting calls or obtaining local treatment of what would otherwise be

toll calls does not change the fact that calls to these three NPA-NXXs were not ELCS and thus were toll.

D. The PUCT did not violate the local parity rule.

The local parity rule is designed to make sure that competitive local exchange carriers are not disadvantaged because ILECs require that calling competitors' customers involve dialing more digits than calling the ILEC's own customers. *See* 47 U.S.C. § 153(15) & 47 C.F.R. § 51.205. The calls to the NPA-NXXs at issue present no local parity issue. "One plus" dialing is required for all calls that CenturyTel's San Marcos customers make to numbers located in Austin.

E. The PUCT's order did not affect ASAP's Type 2 interconnection rights.

The PUCT's order only addressed the retail rating of calls CenturyTel customers make and did not involve, or in any way affect, ASAP's interconnection rights.

F. The PUCT did not violate ASAP's "right" to numbering resources.

Again, ASAP claims a sweeping "federal" right — here, to freely assign the NPA-NXXs it obtains to any geographic area it wishes and obtain local calling to those numbers strictly on the basis of this designation — but provides no authority to support its claim.

G. The PUCT properly concluded that CenturyTel's actions were not anticompetitive.

ASAP claims that CenturyTel's imposition of toll charges on the calls to the three NPA-NXXs placed it at competitive disadvantage compared to other providers. But the net

result is simply the assessment of the same toll charge assessed on any San Marcos-to-Austin call made by a CenturyTel customers.

Moreover, ASAP cannot claim that it or any competitive LEC is unfairly excluded from ELCS; the Commission's rules allow competitive providers to obtain ELCS under the same terms as ILECs. *See* 16 TEX. ADMIN. CODE § 26.272(d)(4)(A)(iii). It be would discriminatory to *allow* ASAP to obtain local calling from San Marcos to the Austin ISPs by using the three NPA-NXXs. Other providers would not be able to obtain local calling from San Marcos to Austin ISPs.

H. The PUCT properly found the ISP business was not incidental to ASAP's CMRS business and it did not improperly exercise authority over interstate internet service.

The calls to ASAP customers at issue before the PUCT almost exclusively involved ISP access rather than paging service. The calls were not CMRS. They did not involve any part of ASAP's wireless network and were completely unrelated to its paging business; they were in no measure "incidental" to it. The ISP calls were carried almost exclusively over other carriers' facilities, particularly those of CenturyTel and SWBT; the main service that ASAP provided was the assignment of a number it had obtained from NANPA for Kyle, Fentress and Lockhart paging customers.

Accordingly, in considering ASAP's complaint, the PUCT found that, in light of the service it is providing to the ISP, ASAP must register as a "telecommunications utility."³⁴

³⁴ Appendix Tab A, PUCT Order at 3-4.

Registration under PURA § 52.103 is a simple process and is not onerous. The PUCT concurred with the ALJ that ASAP is a “telecommunications utility” under PURA § 51.002(11)(E) and thus, pursuant to PURA § 52.103, it must register with the PUCT.³⁵ It reasoned that ASAP’s ISP service was not incidental to its CMRS service and that its CMRS license did not preclude the PUCT from requiring that it register its non-CMRS ISP business as a telecommunications utility.³⁶

Following the enactment of the FTA in 1996, the Commission considered which PURA provisions were preempted by the new federal law. The PURA § 52.103 registration requirement was not one of a few PURA provisions that was preempted.³⁷ Moreover, the fact that ISP service is considered interstate for purposes of determining reciprocal compensation between carriers does not alter that determination. The Commission’s *ISP Remand Order* does not preclude all state oversight of any telecommunications service that may be involved with internet dial-up service; if it did, *all* state regulation of local exchange service would be prohibited, an obviously absurd result.

³⁵ Appendix Tab A, PUCT Order at 3, 17 (conclusions of law 14 & 15) & 20 (ordering ¶ 4). PURA § 51.002(11)(E) includes within the definition of a telecommunications carrier “a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system.” Because ASAP’s ISP service was conveyed solely over a telephone system, Appendix Tab A, PUCT Order at 3 & 12 (findings of fact 24), it qualified as a “telecommunications utility” under PURA § 51.002(11)(E).

³⁶ Appendix Tab A, PUCT Order at 13 (findings of fact 29 & 30), 16 (conclusions of law 6). The PUCT found that ASAP was not required to obtain PUCT certification for its service to ISPs, however. Appendix Tab A, PUCT Order at 17 (conclusions of law 10, 12, & 13).

³⁷ *In the Matter of the Public Utility Commission of Texas*, 13 F.C.C. R. 3460 (1997), *pet. for rev. denied*, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

CONCLUSION

ASAP presents no basis for the preemption of the PUCT's order on its complaint against CenturyTel, or of any provision of PURA or PUCT rule, under 47 U.S.C. § 253 or § 332(c)(3). ASAP's petition for preemption should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Hulme, do hereby certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Comments to ASAP Paging, Inc.'s Petition for Preemption was mailed by first class mail to the following on the 23rd day of March, 2004.

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